

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Michael R.,

Claimant,

v.

San Diego Regional Center,

Service Agency.

Case No. 2011020316

**DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on March 22, 2011.

The San Diego Regional Center (SDRC) was represented by Ronald House, Attorney at Law.

Michael R. (Michael or claimant) was represented by Robert and Elva R., his paternal grandparents.

The matter was submitted on March 22, 2011.

**ISSUE**

Is Michael eligible to receive regional center services and supports as a result of a diagnosis of autism?

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. On January 31, 2011, claimant filed a Fair Hearing Request in which he appealed SDRC's determination that he was not eligible for regional center services.

2. On March 22, 2011, the record was opened, jurisdictional documents were presented, documentary evidence was received, sworn testimony and closing arguments were given, the record was closed, and the matter was submitted.

### *Diagnostic Criteria for Autism*

3. "Autism" is a neurodevelopmental syndrome defined by severe deficits in social reciprocity, impaired communication, and unusual, restricted, repetitive behaviors. Autism has been conceptualized as a spectrum disorder under the diagnostic umbrella of Pervasive Developmental Disorder. Under this umbrella are more specific diagnoses: Autistic Disorder, Asperger Disorder, Pervasive Developmental Disorder – Not Otherwise Specified, Rett Disorder and Childhood Disintegrative Disorder. Distinctions among the autism spectrum disorders basically depend upon the degree of language deficit, general cognitive delay and/or the severity of the social or behavioral symptoms. An individual must have a DSM-IV diagnosis of "autistic disorder" to qualify for regional center services.<sup>1</sup>

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<sup>1</sup> Official Notice is taken that the DSM-IV criteria for a diagnosis of "Autistic Disorder" are:

( I) A total of six (or more) items from (A), (B), and (C), with at least two from (A), and one each from (B) and (C)

(A) qualitative impairment in social interaction, as manifested by at least two of the following:

1. Marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction

2. Failure to develop peer relationships appropriate to developmental level

3. A lack of spontaneous seeking to share enjoyment, interests, or achievements with other people, (e.g., by a lack of showing, bringing, or pointing out objects of interest to other people)

4. A lack of social or emotional reciprocity (note: in the description, it gives the following as examples: not actively participating in simple social play or games, preferring solitary activities, or involving others in activities only as tools or "mechanical" aids)

### *Evidence Presented At Hearing*

4. During a July 21, 2000, psychological evaluation, conducted when Michael was almost four years old, Michael's grandmother reported that Michael exhibited behavioral and emotional difficulties. He was aggressive with friends and with his teacher. He was described as sweet but explosive. He became frustrated very easily and had trouble with change. He enjoyed singing and had a sense of humor. He was anxious during testing, which may have affected his scores although he was cooperative. Cognitive testing was in the low average range and while there was a significant discrepancy in test scores, clear strengths and

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(B) qualitative impairments in communication as manifested by at least one of the following:

1. Delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
2. In individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
3. Stereotyped and repetitive use of language or idiosyncratic language
4. lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

(C) restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following:

1. Encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
2. Apparently inflexible adherence to specific, nonfunctional routines or rituals
3. Stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
4. Persistent preoccupation with parts of objects

(II) Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years:

(A) social interaction

(B) language as used in social communication

(C) symbolic or imaginative play

(III) The disturbance is not better accounted for by Rett Disorder or Childhood Disintegrative Disorder.

weaknesses were noted. An Axis I diagnosis was deferred; the Axis II diagnosis was “no diagnosis.” Michael's grandparents reported that they had adopted him because of psychiatric issues with his parents. A “court report”<sup>2</sup> stated, “Michael is a very socially connected child which rules out some more severe disorders, however, his behavior is of significant concern and should be monitored closely.” It was recommended that Michael be referred to a therapist to help him deal with behavior and emotional problems and that he undergo a thorough medical examination to rule out underlying medical complaints. It was recommended that his grandmother consider staying home to take care of him rather than placing him in daycare 11 hours per day and that it was suggested that she would need support in working with him.

5. 2005 medical records from Shari Jacobs, M.D., assessed Michael with ADHD and documented his behavioral issues.

6. A September 19, 2006, letter from Michael’s treating psychiatrist documented a working diagnosis of ADHD.

7. A September 19, 2007, school district evaluation included scores on the Asperger Syndrome Diagnostic Scale. His grandmother thought that Asperger syndrome was likely; his teacher thought it was very unlikely. Michael was diagnosed with Attention Deficit Disorder, for which he takes medication. An eligibility criterion for autism was considered but it determined that that Michael did not exhibit behaviors associated with that disability in the school setting. He was found eligible for services due to a specific learning disability; his “Other Health Impaired” disability was ADHD.

8. 2010 Psychiatric Center at San Diego progress notes indicated Michael made a few threats to his grandmother and needed to learn to express himself appropriately. He had trouble making friends. He had trouble concentrating, became distracted, and had problems with organization. He threatened to jump off the balcony and hits his head on occasion. He made friends, but he did not keep them for long. He became angry and nervous when picked on at school. He became angry with his sister.

10. A July 2010 nurse practitioner note contained an Axis I diagnosis of attention deficit hyperactivity disorder, combined type, and Asperger disorder.

11. A September 22, 2010, school district evaluation reported that Michael was seen because of concerns relative to his speech and language and autism. His current evaluation indicated that his cognitive abilities fell within the low to below average range and that he demonstrated characteristics of autism on some assessments. Although he did not display all of the autistic-like behaviors, his behaviors impacted his learning in such a way that he would benefit from special education services.

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<sup>2</sup> The court report was not introduced at hearing.

12. A December 8, 2010, SDRC Social Summary documented that Michael had been diagnosed with ADHD and specific learning disability. A psychiatrist had also diagnosed him with autism, but eligibility for regional center services had not yet been determined. Michael possessed a good vocabulary, but his reciprocal conversation skills were limited. He was very talkative at home. He had poor social skills and he asked why his friends considered him strange. He had poor social boundaries, getting too close to peers. He responded better with adults than with children of his own age. He was not a demonstrative or affectionate boy. He was not empathetic to others. He had temper tantrums and threatened to injure himself and others. He hit his head, stating that it helped to release pressure, and that he heard voices.

13. Michael's Individualized Education Program (IEP) stated that Michael qualified for services due to a Specified Learning Disability. It reported that Michael loved to read. He enjoyed talking with friends and telling them stories. His goal was to improve his behavior and to lessen disturbances in the classroom. He experienced behavioral issues when he became frustrated or when he did not understand or enjoy an assignment. Michael also had speech difficulties.

14. SDRC employees Bill Stein and Ronald Plotkin, Ph.D., testified that their record review indicated that Michael had numerous behavior and cognitive issues, but that he did not possess a DSM-IV diagnosis of autism and that he does not qualify for regional center services. Qualifying for special educational services does not equate to eligibility for regional center services.

15. Michael's grandmother testified about Michael's extraordinary needs and her concerns he has autism. His grandparents have clearly been Michael's salvation. She testified about the financial burden she and her husband have endured and her concerns about who will help her family. Despite that heartfelt and moving testimony, the evidence did not demonstrate that Michael possesses a DSM-IV diagnosis of autism. Michael's grandmother's testimony about Michael's reactions to peers (he gets hurt when they tease him) and his relationship with his sister (he wonders why he is not like her) demonstrated a social awareness that was incompatible with a diagnosis of autism.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

*Statutory Authority*

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

3. Welfare and Institutions Code section 4501 states:

“The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.”

4. Welfare and Institutions Code section 4512, subdivision (a) defines “developmental disability” as follows:

“‘Developmental disability’ means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.”

5. California Code of Regulations, title 17, section 54000 provides:

“(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

6. California Code of Regulations, title 17, section 54001 provides:

“(a) ‘Substantial disability’ means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.”

#### *Appellate Authority*

7. The purpose of the Lanterman Act is to provide a “pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life.” (Welfare and Institutions Code section 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

8. The Lanterman Act enumerates legal rights of persons with developmental disabilities. A network of 21 regional centers is responsible for determining eligibility, assessing needs and coordinating and delivering direct services to individuals with developmental disabilities and their families within a defined geographical area. Designed on a service coordination model, the purpose of the regional centers is to “assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.” The Department of Developmental Services allocates funds to the centers for operations and the purchasing of services, including funding to purchase community-based services and supports. (*Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 682-683.)



*Evaluation*

9. Michael does not have a diagnosis of autism. Michael's IEP documents and medical records did not establish that Michael possesses a DSM-IV autism diagnosis, and those records and reports were insufficient to establish his edibility for regional center services and supports.

ORDER

Claimant's appeal from the San Diego Regional Center's determination that he is not eligible for regional center services and supports is denied. Claimant is not eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act. He does not have a qualifying diagnosis of autism.

DATED: April 4, 2011

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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings

NOTICE

**This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.**